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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1409

LONNIE NORTH,

Appellant,

vs.

C. B. RUSSELL AND NATHANIEL "TRAP" HELTON, JAILER OF HARLAN COUNTY,

Appellees.

On Appeal From The Court Of Appeals Of Kentucky

REPLY BRIEF FOR APPELLANT WITH NEW AUTHORITIES

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I.

FAY v. NEW YORK, CITED BY APPELLEES, MUST BE VIEWED IN ITS HISTORICAL CONTEXT.

Fay v. New York, 332 U.S. 261 (1947), cited by Appellees on page 15 of their brief and by *Amicus*, New York State Association of Magistrates, on page 16 of its brief implies a standard and scope of Supreme Court review of state criminal actions which is no longer

viable. *Fay v. New York, supra,* was decided by this Court in 1947 and the case must be viewed in its historical context.

Whatever definition may be currently or historically attributed to "due process" and whatever scope of judicial review of state criminal actions may appertain, currently or historically, it is clear that neither concept is static and that a good many things have happened in terms of Fourteenth Amendment rights since 1947.[1] The development of both concepts have been characterized by ebbs and flows, see Robert C. McCloskey, *The Modern Supreme Court,* Harvard University Press (1972), and the period from 1946 to 1953 seems to have been an era of relative quiet in terms of due process development and sometimes, even, retreat.[2]

II.

THE ABILITY TO DETERMINE PROBABLE CAUSE DOES NOT IMPLY THE ABILITY TO CONDUCT A FULL-BLOWN CRIMINAL TRIAL.

Both the Appellees and New York State Magistrates' Association contend that, because this Court in *Shadwick v. City of Tampa,* 407 U.S. 345 (1972), approved the issuance of a warrant of arrest by a non-

[1] It has been suggested that *Fay* has been overruled, see *Duncan v. Louisiana,* 391 U.S. 145, 185, Note 25 (1967). See also Note of Justice Douglas, concurring in *Alexander v. Louisiana,* 405 U.S. 625 (1972), at page 642.

[2] McCloskey, supra, 57-126; Thomas I. Emerson and David Haber, *Political and Civil Rights in the United States* (1952).

lawyer clerk,[3] there is somehow imputed to a lay judge the ability to conduct a full-blown criminal trial. This conclusion is neither supported by the clear language of *Shadwick* nor by any reasonable interpretation of the opinion in that case.

A determination of probable cause followed by the issuance of a warrant for arrest or search is not analogous to the conduct of a full-blown criminal trial which leads to a deprivation of liberty.

III.

SUPERFICIAL TRAINING COURSES ARE NO SUBSTITUTE FOR COMPREHENSIVE LEGAL EDUCATION.

The New York State Magistrates' Association advances argument that lay judges in New York (and perhaps in other states) are adequately trained to conduct criminal trials and, for that reason, this Court should not apply *per se* invalidation of imprisonment in trials conducted by lay judges.

We submit that cram courses of the kind described in the brief of the *amicus* do not dispel the specter of due process abridgment inherent in every imprisonment imposed by a lay judge.

Amicus described in its brief, page 13, the educational level of those magistrates constituting the judicial laity in the State of New York. According to those figures,

[3] Appellees' suggestion at page 19 of their brief, that ". . . it was apparently argued in *Shadwick* that this Court should make a *per se* invalidation of Tampa's warrant system on the ground that the issuing magistrate was not a lawyer or a judge" is in error. An examination of appellant's brief on the merits in *Shadwick, supra,* and his reply brief shows that no such argument was advanced.

only 16% of the lay judges presently presiding in the State of New York have the minimum educational qualifications necessary to even *gain admission* to an accredited law school. To argue that a cram course is adequate to prepare a layman, not even possessing such educational requirements, to preside in a full-blown criminal trial is untenable.[4]

The Supreme Court of California, in *Gordon v. Justice Court*, 525 P. 2d 72 (Cal., 1974), properly rejected an argument, advanced by the State of California, that California's lay justice training program was adequate to assure provision of due process rights in a criminal case involving imprisonment. The California system of cram courses and examination of lay judges received close scrutiny in *Gordon v. Justice Court, supra*, and was found to be wanting. Similarly, the Utah state courts are examining their own training program for lay judges and have determined that that system of training is likewise unsatisfactory. See *Amicus* brief of Salt Lake Legal Defenders Association.

Is not the possession of a license to practice law in the state involved the only reasonable way to assure that, uniformly, there will be judges having sufficient legal training to preside in a criminal trial?

[4] Chief Justice Burger in his annual report on *The State of the Judiciary, American Bar Association, Mid-Winter Meeting, February 23, 1975*, noted that even a fully accredited legal education does not always qualify a lawyer to serve as an effective participant in a criminal proceeding. See also *New Administration Rules Proposed for Federal District Courts*, American Bar Association Journal, 61 ABAJ 945.

IV.

A REQUIREMENT THAT SENTENCES OF IMPRISONMENT BE IMPOSED ONLY AFTER TRIAL PRESIDED OVER BY LAWYER-JUDGES WOULD NOT UNDERMINE THE ADMINISTRATION OF CRIMINAL JUSTICE IN NEW YORK STATE.

The New York State Magistrates' Association predicts in its *Amicus* brief that a *per se* rule of unconstitutionality in this case would produce chaos in the criminal processes of the State of New York. The Association predicts that such a rule would (1) require a new court system; (2) result in intolerable costs; (3) result in "clogged calendars" and "inconvenience for litigants". We think that the New York State Magistrates' Association is altogether too pessimistic.

First, the assertion that a *per se* rule of unconstitutionality in this case would require a new court system in the State of New York is precisely that—an assertion. A close review of the courts in the State of New York indicates otherwise. In 1973, town and village courts in New York disposed of 1,571,265 criminal cases.[5] Moreover, during that same year, fewer than 25,000 persons were committed to county penitentiaries and jails for non-felony offenses.[6] Thus, not more than 2% of all criminal trials in New York State's town and village courts resulted in actual imprisonment.[7] These

[5] State of New York, The Judicial Conference and Office of Court Administration, *Twentieth Annual Report*, 1975, Table 22, Page 53.

[6] State of New York, Commission of Corrections, *Forty-Seventh Annual Report*, 1973, Appendix B, Page 3, and Table entitled, "Reasons for Commitment—Sentenced to Jail of County".

[7] Moreover, this percentage figure includes all imprisonment terms, including those imposed by the lawyer judges of the city and district courts who also sentence to county jails and penitentiaries.

statistics do not support *Amicus'* position that a new court structure would be required to provide lawyer judges to the relatively small number of persons actually receiving terms of imprisonment from town and village courts.

Secondly, *Amicus* complains that a *per se* rule of unconstitutionality in this case would result in an "intolerable expense" which would be "catastrophic", *Amicus* brief, page 26. We would point out that the guarantee of due process in any system of government is expensive and requires an outlay of funds greater than that required by any system less vigilant in its protection of individual rights. Even so, we do not feel that such a *per se* rule in this case would overtax New York State's resources when reference is made to budgetary figures for last fiscal year. The Association's projection of a $70 million dollar increase in costs envisions a complete restructuring of the substructure of New York State's court system. As we have said, no showing has been made that such restructuring is necessary. Even so, during the fiscal year ending March 31, 1975, the state's share of the costs of the court system was estimated at $69.99 million.[8] Since the total state budget for the same period was estimated at $9.794 billion dollars,[9] the courts' share of the estimated state budget represents considerably less than 1% of the total, a modest share considering their importance.

Finally, the prediction that a *per se* rule would result in "clogged calendars" and "tremendous inconvenience for litigants" is an assertion only. It is hard to see how

[8] State of New York. Judicial Conference and Office of Court Administration, *Special Six-Month Report*, 1975, Pages 5-7.

[9] State of New York, *Annual Budget Message*, 1975-1976.

the provision of lawyer-judges to less than 2% of accused misdemeanants could produce administrative chaos in the courts of New York. New York law makes virtually every traffic infraction punishable by both fine and imprisonment.[10] Most of the one and one-half million cases handled by Town and Village Courts during 1973 appear to be traffic infractions.[11] Yet, jail sentences seem to be imposed in only a relatively few of such traffic cases.[12] It would appear that removal of jail terms from most traffic infractions has already occurred in New York State. See, e.g. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), Footnote 10, at Page 38. *De jure* decriminalization of such infractions would appear to be a viable option available to New York State if it should desire to retain its lower court structure intact and still meet a requirement of lawer judges in all cases in which actual imprisonment results.[13] And rules providing for reference by lay judges, of all cases in which imprisonment seems to be appropriate, to district courts presided over by law-trained judges would seem to be another of

[10] New York Code, *Vehicle and Traffic Law*, Titles I through VII and Title IX, § 1800.

[11] State of New York, The Judicial Conference and Office of Court Administration, *Twentieth Annual Report*, 1975, Table 22, Page 53.

[12] Forty-Seventh Annual Report of New York State Commission of Corrections, 1973, Supra, Footnote 6.

[13] This Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) said: "How crimes should be classified is largely a state matter. The fact that traffic charges fall within the category of 'criminal prosecutions' does not necessarily mean that many of them will be brought into the class where imprisonment actually occurs", 407 U.S. at 38.

the several options available to New York.[14] Retention of jurisdiction of non-imprisonment cases by lay town and village courts would not collide with the prophylactic rule sought in this case, and reference of imprisonment cases to lawyer judges would seem to portend no great tribulation for the state's budget, the lay magistrates, or for the trial calendars.

NEW AUTHORITIES

I.

THE RECENTLY ARTICULATED RIGHT OF SELF-REPRESENTATION INCREASES THE NEED FOR LAWYER JUDGES.

Since this Court's decision in *Faretta v. California*, 95 S. Ct. 2525 (1975), many defendants have a right to act as their own counsel. This right of self-representation makes even more critical the role of the judge and increases the danger of over-reliance by untrained judges upon the prosecutor.

In *Faretta, supra*, Mr. Justice Blackmun, in his dissent, cast the question:

> "Must the trial court treat the pro se defendant differently than it would professional counsel?"

The answer has traditionally been "yes".

[14] This Court in *Argersinger v. Hamlin*, supra, at page 40, said: "Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts," 407 U.S. at 40.

Chief Justice Burger in the same case observed:

> ". . . the trial judge is not simply an automaton who insures that technical rules are adhered to. [He is] charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial".

In a trial conducted by a judge not fully trained in the law, what assurance is there that justice will be achieved in every such criminal trial?

II.

THE RECENTLY ARTICULATED RIGHT TO CLOSING ARGUMENT IMPLIES A COROLLARY RIGHT TO A LAW-TRAINED JUDGE.

Herring v. New York, 95 S. Ct. 2550 (1975), ties the right of conclusionary argument to the right of effective counsel. The prophylactic rule articulated in that case conferring the absolute right of summation upon defendants and their counsel even in non-jury cases implies the due process necessity of a fully-informed judge and suggests a similar abridgment of the right to effective counsel in those cases presided over by judges not able by training, knowledge and experience to comprehend such argument of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief for Appellant were served upon Honorable Wix Unthank, Commonwealth Attorney, Harlan, Kentucky 40831, Attorney of Record for Appellees, C. B. Russell and Nathaniel "Trap" Helton, and upon Honorable Ed W. Hancock, Attorney General, Commonwealth of Kentucky, Frankfort, Kentucky 40601, by mailing same, postage prepaid, on this 30th day of October, 1975.

Charles E. Goss

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